No. 79-646

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD GRADY PARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
DEBORAH WATSON
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals is reported at 601 F.2d 1000.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1979. A petition for rehearing was denied on August 27, 1979. Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to October 19, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's representation by an attorney who also represented a former co-defendant denied petitioner the effective assistance of counsel when the former co-defendant testified against petitioner after waiving his attorney-client privilege.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on three counts of conspiring to obstruct justice, in violation of 18 U.S.C. 371 and 1503. He was sentenced to concurrent terms of four years' imprisonment on Counts I and III and a consecutive term of four years on Count II. The court of appeals affirmed (Pet. App. A).

1. On October 4, 1973, a three-count indictment was filed in the Middle District of Louisiana charging petitioner, Harold Sykes, Ben Trantham, and nine others with conspiring to change the testimony of witnesses and to prevent witnesses from testifying in connection with two previous cases in which petitioner was a defendant.[1] The trial that is the subject of the instant petition, held in San Diego, California as a result of a transfer motion, was petitioner's third trial under this indictment.

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[1] The history of the earlier cases and the genesis of the instant prosecution are set forth in *United States* v. *Partin*, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

Petitioner, who was tried separately from the other defendants, retained James McPherson as his attorney at his first and third trials. McPherson was also retained by seven other co-defendants, including Harold Sykes and Ben Trantham, both of whom were named in Count II of the indictment and were convicted at a separate trial.[2]

In May 1974, before any of the co-defendants had come to trial, the government filed a motion requesting that the trial judge hold a hearing regarding the representation of eight of the co-defendants by the same attorney. The government was concerned that such multiple representation might create a conflict of interest for attorney McPherson and deprive defendants of their Sixth Amendment right to effective assistance of counsel. At a hearing attended by all of the co-defendants and attorney McPherson, United States District Judge Nauman Scott[3] questioned McPherson about his representation of multiple defendants. McPherson informed Judge Scott that he had discussed the case with his clients and was satisfied that there was no conflict of inter-

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[2] Sykes and Trantham were first tried and convicted in August 1974. Their convictions were reversed and remanded on June 17, 1975. *United States* v. *Marionneaux*, 514 F.2d 1244 (5th Cir. 1975), cert. denied, 434 U.S. 903 (1977). In July 1975, Sykes and Trantham were again tried and convicted, and their convictions were affirmed on appeal. *United States* v. *Partin, supra.* Sykes then petitioned for a writ of certiorari, No. 77-34, which was denied on October 17, 1977, several weeks after petitioner's third trial was concluded. *Partin* v. *United States*, 434 U.S. 903 (1977).

[3] Judge Scott presided at all three of petitioner's trials.

est. McPherson also stated that he had discussed with his clients the possibility of unforeseen conflicts that might arise in the course of the proceedings and that his clients still wished to be represented by him, even though they understood that there might be conflict of interest problems in that representation (Pet. App. 3a-4a).

After questioning McPherson, Judge Scott addressed each defendant and advised him of the importance of his Sixth Amendment right to the effective assistance of counsel and, in particular, of his right to be represented by counsel who was free of any conflict of interest. He informed the defendants of the potential problems of multiple representation and specifically of the problems that could arise if one defendant testified against another. He advised them that if they could not afford separate counsel, the court would appoint counsel for them. He asked them if there were any questions; there were none. Judge Scott then told all defendants to contact the clerk of the court in Baton Rouge, Louisiana, if they wished to have counsel appointed for them.[4] No defendant responded to the invitation.

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[4] The pertinent portion of Judge Scott's advice to the co-defendants was as follows (Pet. App. 4a-5a n.5):

> Counsel whom you have retained in this matter; that is, Mr. McPherson and Mr. Atkins, have advised me that they have discussed the question of conflict of interest with you and that each of them is satisfied in his own professional judgment that there is no conflict of interest with respect to the charges against each of you and the defenses that might be asserted with regard to those charges. In addition, each has informed me that he had discussed with you the questions which may arise in the future and the possibility, although there appear to be no conflicts of interest now, it might develop at a later date that one or more of you may have different interests from the other. I do not mean to question the judgment of either of them in this regard, I do want, however, to advise you to think carefully about this matter, about what is in your own best interest, and about your constitutional rights. Let us assume a different kind of charge. Let us assume that two people are charged with robbing a bank and are being tried jointly. Let's assume they are both being represented by the same lawyer. It might happen during the course of that trial that one of the persons charged with the crime might want to change his defenses in the middle of the trial. He might want to take the witness stand and testify that the other person in some way forced him to participate in the bank robbery. If that happened in the case of the two bank robbers, and if they were both represented by the same lawyer, obviously one would have a different interest from the other and the lawyer would have a conflict of interest. If one defendant could take the witness stand and begin to testify against his co-defendant he might end up being acquitted, but he would undoubtedly add to the evidence against the co-defendants . . . . I simply want to advise that if you think that you have a lawyer who has or may have a conflict of interest, and if you wish to change counsel, the Court will appoint another counsel to represent you. Any person who is not able; that is, financially not able to afford a lawyer, can have a lawyer appointed for him without charge . . . . If however, you are satisfied with your present counsel and you are satisfied to run any risks that may hereafter develop of a possible conflict of interest, you certainly

Petitioner's first trial (and that of two co-defendants) commenced on November 13, 1974, but ended in a mistrial after the first day. The trial of

the two-codefendants was then severed from petitioner's trial.

2. Petitioner's second trial, in February and March of 1975, resulted in a conviction on all three counts charged in the indictment. Attorney McPherson did not represent petitioner at this trial. One of petitioner's co-defendants, Ben Trantham, testified against petitioner. Trantham was appealing his conviction on Count II of the indictment at the time of his testimony. Trantham had been represented by McPherson at his trial and was being represented by him on appeal. Petitioner's conviction at his second trial was reversed in May 1977. *United States* v. *Partin*, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

3. Before petitioner's third trial commenced and several months after Harold Sykes' conviction was affirmed on appeal (*ibid.*), Sykes called the Assistant United States Attorney in charge of the trials of petitioner and his co-defendants and told him that he wished to cooperate with the government (Tr. 296). At the time, McPherson was representing Sykes in connection with a pending petition for a writ of certiorari to review the Fifth Circuit deci-

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have the right to do this . . . . Now, if anyone has any questions they would like to ask me about this? All right. . . .

I would, however, say that if you wish other counsel I would like—well, I will give you a chance to think about it and if you wish other counsel, you may contact the Clerk of the Court here in Baton Rouge and make such a request on or before ten days from this date.

sion affirming his conviction.[5] Sykes told the prosecutor that he believed that attorney McPherson considered petitioner's interests to be paramount to his and that McPherson had thrown him and other co-defendants "to the dogs" in order to save petitioner (Tr. 296, 305-306). Sykes requested that his cooperation be kept a secret because he feared for his safety if his cooperation became known (Tr. 296, 312-313). Sykes subsequently gave two statements to the FBI prior to petitioner's trial (Tr. 296, 311-312).

Pursuant to Sykes' request, the prosecutor did not inform McPherson of Sykes' cooperation, but he did inform the trial court that Sykes had given a statement and would be a government witness at trial (Tr. 296, 310-311).[6] In addition, the government advised McPherson prior to trial that writs of *habeas corpus ad testificandum* had been issued to Harold Sykes and two other of petitioner's convicted co-defendants (also represented by McPherson) to secure their presence at trial (G. Br. 29 & n.9; see also R. 42 [docket entry]).[7]

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[5] Sykes originally retained McPherson to represent him. After his first trial and appeal, he was no longer able to afford counsel, and McPherson was appointed to represent him.

[6] At trial, Judge Scott did not remember the prosecutor's advising him that Sykes would be a government witness, but stated that he was sure the prosecutor had done so (Tr. 310).

[7] On motion of the government, copies of these writs were included in the record on appeal. "G. Br." refers to the government's brief on appeal.

Petitioner's third trial was held between September 26 and October 4, 1977, several weeks before this Court denied Sykes' petition for a writ of certiorari. He was represented at the trial by McPherson and by John Mitchell, who served as local counsel (Tr. 72).

When the government called Sykes as a witness at trial, Judge Scott recessed the proceedings and held a hearing in chambers concerning the matter (Tr. 297). McPherson informed Judge Scott that he had a conflict of interest because he was representing Sykes in a petition for a writ of certiorari; he stated that due to his attorney-client relationship with Sykes, he would be unable to cross-examine Sykes effectively (Tr. 298, 300). Judge Scott then interviewed Sykes outside the presence of the prosecutor and defense counsel in order to determine whether Sykes wished to confer with McPherson before testifying (Tr. 302). Sykes informed the court that he did not wish to do so (Tr. 304).

Following Judge Scott's interview with Sykes, McPherson moved for a mistrial in order to afford petitioner an opportunity to retain new counsel who would be free to cross-examine Sykes (Tr. 308). Judge Scott denied the motion, noting that McPherson's motion came with "poor grace'" in light of petitioner's insistence on retaining McPherson despite Judge Scott's earlier conversation with all the defendants concerning the possible disadvantages of multiple representation, and, in particular, the possibility that some of the defendants might later de-

cide to testify as government witnesses (Tr. 313-314). Judge Scott further stated that while McPherson could still represent petitioner at the trial, he felt that McPherson could no longer represent Sykes (Tr. 314); he suggested that Sykes formally discharge McPherson as his attorney (Tr. 316).

McPherson, although still urging a mistrial, stated that he did not believe it would be necessary for Sykes to discharge him as his attorney (Tr. 318). McPherson suggested that if Sykes waived the attorney-client privilege, he would be able to cross-examine Sykes effectively, and that such a procedure would resolve any ethical considerations (Tr. 314-318). Judge Scott called Sykes into chambers and in the presence of the prosecutor and defense counsel explained to him the attorney-client privilege and asked whether Sykes would be willing to waive the privilege (Tr. 320). McPherson also explained the privilege to Sykes, informing him that in order to represent petitioner, he (McPherson) would have to attack Sykes' credibility on cross-examination, and in doing so would have to use information Sykes had divulged to him during the attorney-client relationship (Tr. 321-323). Sykes stated that he understood and that he was willing to waive the privilege (Tr. 325). He further stated that McPherson could cross-examine him on any matter and could use on cross-examination any information obtained during the course of the attorney-client relationship (Tr. 324-325).

Prior to the resumption of the trial, petitioner addressed the judge, informing him that he wanted a

new attorney in light of the conflict of interest (Tr. 326-327). Judge Scott denied the request, stating that the situation about which petitioner was now complaining had occurred because petitioner had chosen to ignore his earlier warning about the potential problems of multiple representation (Tr. 327-328).

Sykes then testified on direct examination, admitting his guilt on Count II of the indictment and implicating petitioner (Tr. 328-363). Prior to cross-examination, McPherson interviewed Sykes. McPherson had been given copies of the two statements Sykes had made to the FBI (Tr. 366-367). After the interview McPherson informed Judge Scott that he had had ample time to prepare his cross-examination and that he was ready to proceed (Tr. 367). McPherson did not impeach Sykes' credibility during cross-examination (Tr. 368-370).

ARGUMENT

Petitioner claims that his Sixth Amendment right to the effective assistance of counsel was violated because his principal trial counsel was representing prosecution witness Harold Sykes in connection with a petition for a writ of certiorari and had represented Sykes at his separate trial and on appeal of his conviction on Count II of the instant indictment.

1. Citing *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), and decisions by the Fifth Circuit, *Stephens* v. *United States*, 595 F.2d 1066 (5th Cir. 1979); *Zuck* v. *Alabama*, 588 F.2d 436 (5th Cir.), cert. denied, No. 78-1741 (Oct. 1, 1979); *Castillo* v. *Estelle*,

504 F.2d 1243 (5th Cir. 1974), the Seventh Circuit, *United States* v. *Jeffers*, 520 F.2d 1256 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); *Zurita* v. *United States*, 410 F.2d 477 (7th Cir. 1969), and the District of Columbia Circuit, *Taylor* v. *United States*, 226 F.2d 337 (D.C. Cir. 1955), petitioner correctly states the general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair (see Pet. 17-23). This rule is based on the premise that when one attorney is compelled to represent conflicting interests simultaneously, counsel may be restrained in the zeal of his representation of one or both of those interests and may therefore not render the effective assistance of counsel contemplated by the Sixth Amendment. See *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 482; *Glasser* v. *United States*, 315 U.S. 60, 70 (1972). However, nothing in those cases suggests that a trial judge is powerless to adopt measures—or to endorse measures approved by one of the clients—that will eliminate such restraints during a trial.[8]

In the instant case, the solution adopted by the court eliminated the only conflict that concerned defense counsel McPherson or posed any realistic threat to petitioner's interest in loyal representation by his attorney. Upon learning of the conflict of interest,

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[8] Indeed, proposed Rule 44(c) of the Federal Rules of Criminal Procedure states that "the court shall take such measures as may be appropriate to protect each defendant's right to counsel" in cases of joint representation.

the trial court held a hearing on the matter and determined that the basis for McPherson's motion for a mistrial was his belief that he would be unable to cross-examine Sykes effectively due to confidential disclosures that Sykes had made to him during the attorney-client relationship. The court then inquired of Sykes whether he would be willing to waive the attorney-client privilege, and Sykes agreed to do so.[9] This waiver eliminated the conflict of interest and made it possible for McPherson to cross-examine Sykes effectively. See *United States* v. *Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978), in which a co-defendant testifying against one of the appellants was represented by the appellant's attorney. Although the testifying co-defendant there refused to waive the privilege, the court made clear that had he done so, the waiver would have eliminated the conflict of interest.

Petitioner nonetheless claims (Pet. 21-22) that Sykes' waiver of the privilege, which permitted McPherson to question Sykes without fear of divulging otherwise confidential communications, did not adequately free McPherson to cross-examine Sykes. Petitioner argues that McPherson continued to have a professional duty of individual loyalty to Sykes and had to consider, among other things, "the impact of effective cross-examination on his client-witness' hopes for benefits from the government in the future if cross-examination broke down the story the government relied on at trial" (Pet. 22). This claim is not persuasive. Before Sykes waived his privilege, both the court and McPherson carefully explained to him the consequences of such waiver, including the fact that it would allow McPherson to attack Sykes' credibility (Tr. 321-323). Sykes stated that he understood, and that McPherson could cross-examine him on anything he desired.

[9] Sykes' decision was, of course, consistent with his decision to cooperate with the government without notifying McPherson.

Thus, in waiving the privilege, Sykes not only agreed to the disclosure of otherwise privileged information, but he also agreed to relinquish his right to the loyalty of McPherson and to accept the consequences of a thorough attack on his credibility by a defense attorney, whether it be McPherson or another attorney, with all its attendant benefits and burdens. Petitioner cannot now claim that despite such waiver, McPherson still owed a duty to Sykes that he could not breach. The right to claim the protection of the attorney-client privilege and to demand attorney loyalty belonged to Sykes, not to McPherson. See, *e.g.*, *United States* v. *Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976). There is no indication that McPherson felt constrained in his cross-examination of Sykes by his prior attorney-client relationship with him. He had cited the possible use of privileged information as the reason he could not cross-examine Sykes (Tr. 314-315), and he was relieved of any obstacles the privilege might pose by Sykes' decision to waive it. The use of privileged information to impeach a client would, absent a waiver, constitute a rather obvious act of disloyalty to that client, and

McPherson must therefore have understood Sykes' waiver to free him from his obligations to Sykes in this regard as well.

Moreover, when the trial court was apprised of the conflict of interest, it suggested that McPherson would no longer be able to represent Sykes. McPherson, however, assured the court that that would not be necessary, stating (Tr. 318): "I don't think we have to go so far as to require Mr. Sykes to fire me. I think what he has to do before I can proceed on cross-examining him is to waive the attorney-client privilege. And if he does that then I think I am covered."

Absent McPherson's assurances that Sykes' waiver of the privilege would resolve McPherson's ethical dilemma and enable him to cross-examine Sykes effectively, the court might well have suggested that Sykes formally discharge McPherson. In light of Sykes' earlier statements that he felt McPherson had thrown him "to the dogs," it is inconceivable that Sykes would have objected to doing so, particularly because his conviction had already been affirmed by the Fifth Circuit, and McPherson's representation of him before this Court was dormant pending a decision on the petition for a writ of certiorari. Thus, under these circumstances, Sykes' decision to waive the attorney-client privilege and to permit McPherson to cross-examine him in any manner he chose was the practical equivalent of discharging McPherson as his attorney, and his failure to do so formally is of no moment—especially given McPherson's own

representation that waiver of the attorney-client privilege eliminated any obstacle to thorough and effective representation of petitioner.

2. Further, where, as here, the trial court had made an inquiry into the multiple representation of co-defendants by the same attorney and warned the co-defendants of the dangers of such representation, and where the defense counsel and petitioner were aware of the possibility of a conflict of interest arising but nevertheless insisted on proceeding with the joint representation, petitioner bears the burden of demonstrating that specific prejudice has resulted to him from the alleged conflict of interest. See *Solomon* v. *LaVallee*, 575 F.2d 1051, 1055 (2d Cir. 1979); *United States* v. *Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States* v. *Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977); *United States* v. *Carrigan*, 543 F.2d 1053, 1055-1056 (2d Cir. 1976).[10] The requirement that prejudice be shown is especially appropriate here, where the trial court took reasonable measures to

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[10] Petitioner claims (Pet. 27-29) that under *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 487-491, "wherever a trial court improperly requires joint representation over timely objection reversal is automatic" absent any showing of specific prejudice. As demonstrated above, however, not only was petitioner's objection untimely, but the trial court acted properly in requiring McPherson's continued representation of petitioner once Sykes had waived his attorney-client privilege and agreed to permit McPherson to cross-examine him. Nothing in *Holloway* disturbs the settled principle that when the trial court makes a proper inquiry into the multiple representation of co-defendants, advises them of the risks involved, and offers to provide independent counsel, the defendant has the burden of demonstrating specific prejudice.

eliminate any conflict of interest when that possibility later surfaced. Petitioner has not met that burden.

Petitioner claims (Pet. 28-29) that specific prejudice is sufficiently demonstrated by the fact that although Sykes was extremely vulnerable to cross-examination, being an alcoholic and a convicted felon, McPherson failed to attack his credibility.[11] The record clearly shows, however, that McPherson limited his cross-examination of Sykes because he did not wish Sykes' conviction on Count II of the same indictment under which petitioner was being tried to come to the attention of the jury.

At the beginning of the trial, McPherson asked the prosecutor whether he planned to bring out the prior convictions of any of petitioner's co-defendants who would testify at trial (Tr. 36). The prosecutor informed him that, in accordance with the court's ruling at petitioner's first trial, he would bring out the witnesses' convictions if their credibility was attacked (Tr. 36). Thus, by not attacking Sykes' credibility, McPherson avoided bringing to the attention of the jury the fact that one of petitioner's co-conspirators had been found guilty of the same conspiracy with which petitioner was charged in Count II of the

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[11] We note that McPherson alerted the jury to Sykes' character during his opening statement, when he remarked (Tr. 112): "Harold Sykes drinks constantly. He is not as bad as Roberson, but when Harold gets a few drinks he gets kind of wild and he goes on two or three week drunks himself. And there was a big drunk that took place during the time of the Houston trial * * *."

indictment. McPherson's cross-examination of co-defendant Jack Gremillion, Jr., who had pled guilty to Count II, was limited in the same manner as his cross-examination of Sykes. Indeed, following McPherson's cross-examination of Gremillion, the prosecutor informed the court (Tr. 284-286) that he believed McPherson's questioning of Gremillion had laid a sufficient foundation for the government to bring out on redirect examination the fact of Gremillion's conviction on Count II. McPherson and co-counsel Mitchell strenuously objected to the admission of such evidence on the ground that its prejudicial effect would outweigh its probative value (Tr. 284-285, 289). The court sustained defense counsel's objections (Tr. 291).

Again, shortly before the close of the government's case, the prosecutor informed the court that he expected petitioner to testify and requested the court to issue a restrictive order to prevent petitioner from impugning the character of several government witnesses, including Gremillion and Harold Sykes (Tr. 1178-1181, 1184). The prosecutor stated that if petitioner attacked the character of the government witnesses, the government would return the witnesses to the stand and bring out their convictions (Tr. 1186). McPherson agreed to warn petitioner that he could not attack the character of the government's witnesses (Tr. 1193). In these circumstances, it is patently obvious that McPherson refrained from attacking Sykes' credibility on cross-examination in

order to prevent the jury from learning of Sykes' conviction on Count II.

3. In any event, we believe that petitioner waived his right to the assistance of an attorney whose loyalty is not divided between clients with conflicting interests. It is well established that the right to separate counsel, or to any counsel at all, may be waived. *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 483, n.5; *Glasser* v. *United States*, 315 U.S. 60, 70 (1942); *United States* v. *Lawriw*, 568 F.2d 98, 104-105 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978); *United States* v. *Duklewski*, 567 F.2d 255, 257 (4th Cir. 1977); *United States* v. *Garcia*, 517 F.2d 272, 275-276 (5th Cir. 1975); *Lollar* v. *United States*, 376 F.2d 243, 244 (D.C. Cir. 1967); cf. *Faretta* v. *California*, 422 U.S. 806, 807 (1975). Whether there has been such a waiver depends upon "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

Judge Scott's warnings in May 1974, before any of the defendants had come to trial,[12] clearly alerted petitioner to the risks inherent in multiple representation, and, in particular, of the conflict of interest

[12] Judge Scott's inquiry and warning is the type suggested by Rule 44(c) of the proposed amendment to the Federal Rules of Criminal Procedure. That proposed rule states in pertinent part that in cases of joint or multiple representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."

which could be caused by one co-defendant testifying against another.[13] There is no doubt of petitioner's ability to appreciate these warnings concerning the importance of the effective assistance of counsel. The indictment under which petitioner was tried grew out of two earlier cases in which petitioner was a defendant. In the course of those two cases he stood trial three times. See *United States* v. *Partin*, *supra*. Moreover, prior to those two criminal cases petitioner was a defendant in a number of prosecutions in the early 1960's. See *Hoffa* v. *United States*, 385 U.S. 293, 297-298 (1966).[14]

[13] Citing *Schram* v. *Cupp*, 436 F.2d 692, 695 (9th Cir. 1970), petitioner claims (Pet. 26) that the March 1974 hearing alone could not provide a basis for a valid holding of "waiver," since the warnings given at that time were not "reasonably contemporaneous" with the asserted waiver. The instant situation differs dramatically from that in *Schram*. There, the court held that the fact that an indigent defendant had been advised of his right to counsel in a prior case in which he was a defendant did not constitute a waiver of the right to counsel in an entirely different criminal proceeding arising four years later. Here, by contrast, the warnings given petitioner pertained to his right to independent counsel at an earlier trial in the same case. Moreover, unlike the indigent defendant in *Schram*, the record here clearly shows that despite the time lapse between the warnings and petitioner's third trial, petitioner was capable of fully appreciating such warnings.

[14] That counsel was retained rather than appointed supports the conclusion that petitioner's decision to continue with the representation was a knowing and voluntary one. *United States* v. *Gaines*, 529 F.2d 1038, 1043 n.3 (7th Cir. 1976); *Larry Buffalo Chief* v. *South Dakota*, 425 F.2d 271, 279 n.5 (8th Cir. 1970).

Nor was the conflict of interest problem that petitioner raises an unknown contingency at this trial. At petitioner's second trial, when he was not represented by McPherson, one of the government witnesses was Ben Trantham, a co-defendant who was represented by McPherson. Despite this knowledge, petitioner retained McPherson to represent him at his third trial.[15] What is more, McPherson was advised

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[15] Petitioner argues (Pet. 24-25), in effect, that his decision to retain McPherson despite the court's earlier warnings of the possibility of a co-defendant testifying against him did not constitute a waiver because he did not know that Sykes, in fact, would so testify. We do not believe that petitioner's waiver was any less effective simply because he did not know which co-defendant, if any, might testify for the government. In electing to retain McPherson, he accepted the precise risk of which the court had apprised him—namely, that a co-defendant represented by McPherson might testify against him. Clearly, a defendant can waive not only existing conflicts, but also possible conflicts to which he has been alerted. See, *e.g.*, *United States* v. *Villarreal*, 554 F.2d 235, 236 (5th Cir.), cert. dismissed, 434 U.S. 802 (1977); *Hayman* v. *United States*, 205 F.2d 891, 895 (9th Cir.), cert. denied, 346 U.S. 860 (1953). The possibility of such an occurrence was amply brought home to petitioner when Ben Trantham testified against petitioner at his second trial. Indeed, on the first day of petitioner's third trial, the prosecutor informed petitioner and McPherson that because Trantham, now dead, was no longer available as a witness, he might introduce into evidence Trantham's testimony from the preceding trial (Tr. 31-34). Neither petitioner nor McPherson voiced any objections to such procedure on the ground that McPherson's ability to attack the credibility of Trantham's testimony (pursuant to Rule 806 of the Federal Rules of Evidence) would be impaired by any conflict of interest arising from McPherson's continuing duty to protect information learned from Trantham during the attorney-client relationship. See 8 J. Wigmore, *Evidence* § 2324 (1961 ed.) (attorney client privilege continues even after the death of the client).

by the prosecutor *prior to trial* that the government had issued writs of *habeas corpus ad testificandum* to Harold Sykes and two other convicted co-defendants, yet McPherson neither advised the court nor took any other steps to resolve a potential conflict of interest problem that would result if Sykes in fact testified. This reinforces the conclusion that petitioner knowingly waived his right to the assistance of counsel free from any conflict of interest.

4. Finally, petitioner contends (Pet. 15, 24, 28 n.13) that reversal is required because the conflict of interest arose as a result of the government attorney's misconduct in not notifying McPherson of his contacts with Sykes, and that such contact violated Disciplinary Rule 7-104 of the American Bar Association Code of Professional Responsibility. That rule provides that a lawyer representing a client shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer without the lawyer's consent, unless he is "authorized by law to do so." The court of appeals found (Pet. App. 8a-9a) that the prosecutor's conduct constituted an ethical violation. The court indicated, however, that Sykes' status under the Disciplinary Rule may have been different because he was no longer an accused, his conviction having been affirmed on appeal. But beyond this, the court held that petitioner did not

have standing to assert a violation of an ethical standard—or even a Sixth Amendment violation—affecting *Sykes'* relationship with his lawyer.

We think it plain that petitioner does not have standing to raise a constitutional or ethical challenge to the prosecutor's conversing with Sykes without the knowledge of Sykes' counsel. We also agree with the court of appeals that DR 7-104 is of marginal relevance where the defendant's conviction has been affirmed on appeal and the only remaining stage of the case is a pending petition for a writ of certiorari. These considerations suffice to dispose of this aspect of petitioner's arguments. But in any event, it is our view that the prosecutor's conduct was not unethical under the circumstances of this case.[16]

Sykes contacted the Assistant United States Attorney and offered his cooperation. The initiative did not come from the government. It is clear that a defendant may waive his Sixth Amendment right to the assistance of counsel without notice to his counsel. *Brewer* v. *Williams*, 430 U.S. 387, 405-406 (1977). It is equally clear that Sykes had a constitutional right to act on his own behalf in communicating with the government under the circumstances here presented.

[16] DR 7-104 appears to have been formulated with civil cases in mind, and it is by no means clear that it should be deemed to have general application to criminal cases, in which contacts between the government and the defendant in the absence of counsel are already to a considerable extent regulated by the rule of *Massiah* v. *United States*, 377 U.S. 201 (1964). In any event, we are satisfied that it should not apply in circumstances such as those of the instant case.

Faretta v. *California*, 422 U.S. 806 (1975). A lawyer for the government cannot be thought to commit an ethical violation when he respects the wishes of an individual to exercise his constitutional right to represent himself in dealings with the government.[17] The constitutional right of a defendant to communicate directly with the government official responsible for his fate would be of little value if that official were ethically bound to decline to listen. Thus, the communications between Sykes and the prosecutor, at Sykes' initiative, were "authorized by law" within the meaning of the exception to DR 7-104 of the ABA Code.

Moreover, Sykes insisted that the prosecutor inform no one of his cooperation because he feared for his safety. The prosecutor respected this request. He did, however, inform the court of what Sykes had told him (Tr. 310). Further, McPherson did not object to the fact that the prosecutor had not told him of his conversations with Sykes. McPherson said: "* * * I can understand why [the prosecutor] honored that request, *as he should have*, and as he obviously did" (Tr. 307) (emphasis added). Indeed, the trial court found (Tr. 313) that for the prosecutor to have disclosed the fact of his conversations with Sykes would have constituted a breach of his agreement with Sykes. And, finally, the prosecutor advised McPherson prior to trial that he had issued

[17] Sykes signed a waiver of his right to the assistance of counsel when he gave his two statements to the FBI prior to petitioner's trial (Pet. App. 7a).

writs of *habeas corpus ad testificandum* to Sykes as well as two other co-defendants. McPherson was therefore on notice that his client might be called. Under these circumstances, there was clearly no ethical violation. Cf. *United States* v. *Crook*, 502 F.2d 1378, 1380-1381 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975); *Moore* v. *Wolf*, 495 F.2d 35, 37 (8th Cir. 1974); *United States* v. *Masullo*, 489 F.2d 217, 222-224 (2d Cir. 1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
DEBORAH WATSON
Attorneys

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